



May 19, 2015

United States Patent And Trademark Office
Trademark Trial and Appeal Board
P. O. Box 1451
Alexandria, VA 22313-1451

71529307

RE: Petition to Cancel

TO WHOM IT MAY CONCERN:

Enclosed is the Petition of SkipPy, Inc. v. Hormel Foods, LLC, to cancel SKIPPY registration No. 0504,940, together with a check for the \$300.00 filing fee, and designated exhibits with an Index.

If any other information is needed, please contact me at the address below, or by e-mail.

Respectfully submitted,

A handwritten signature in cursive script, reading "Joan Crosby Tibbetts".

Joan Crosby Tibbetts
President, SkipPy, Inc.
and
Administratrix, Percy Crosby Estate

e-mail: joan@percycrosby.com
joan@percycrosby.com

Enc.



05-21-2015

U.S. Patent & TMO/TC/TM Mail Rcpt Dt. #11

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

SKIPPY, INC.,

Petitioner,

v.

HORMEL FOODS, LLC,

Respondent.

Cancellation No. _____

05/22/2015 DJEFFCDA 00000002 71529307

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05-21-2015

U.S. Patent & TMO/TM Mail Rcpt Dt. #11

PETITION TO CANCEL

1. Skippy, Inc., Petitioner, a private Delaware corporation founded in 1932 by celebrity artist Percy Crosby and having a place of business located at 682 Youngstown Pkwy, No. 331, Altamonte Springs, Florida, 32714, hereby petitions this Honorable Board to cancel SKIPPY registration 0504,940 on the grounds that it was fraudulently obtained and has caused, and will continue to cause, irreparable harm to Petitioner's trade name, goodwill, SKIPPY® trademarks, and Petitioner's First Amendment right to redress and due process of law.

2. The registration in question remains contestable by virtue of a ruling by the United States Court of Appeals for the Fourth Circuit, which vacated a judgment of incontestability and held that a false affidavit had been filed in the attempt to make the SKIPPY registration incontestable. *Skippy, Inc. v. CPC Int'l, Inc.*, 674 F.2d 209, 216 (4th Cir. 1982).¹ Ample evidence demonstrates that the affidavit was *intentionally* false, meaning fraudulent, making cancellation imperative. Ever since the

¹ The Addendum appearing immediately after the petition explains in detail why Respondent's anticipated defenses of res judicata, collateral estoppel, compulsory counterclaim, and release do not preclude relief.

Fourth Circuit's ruling, Petitioner has not had a fair opportunity to make the showing of fraud because of serial, erroneous invocations of the vacated judgment as precluding further inquiry. What has not been addressed is that the Lanham Act registration to Rosefield in 1948 was issued in error and is void *ab initio*. This Honorable Board can and should conduct the necessary inquiry, which requires consideration of the story behind Skippy and how its famous name and identity were wrenched away from Petitioner to facilitate the sale of peanut butter – **even while the 1905 Trademark Act was in force.**

3. It is that factor that Respondent and its predecessors have deliberately ignored, knowing that no court, the TTAB, nor Petitioner ever has seen the 1933-34 opposition file denying the right to register SKIPPY, which public file was destroyed in 1965-66. Thus, years of litigation ensued, whereby Rosefield's Lanham Act SKIPPY registration as exclusive owner was incorrectly presumed valid.

4. For ease of reference, the name "Rosefield" will be used to refer to the various assignees of Rosefield, instead of "predecessors of Respondent Hormel Foods." There have been so many mergers of Rosefield to Best Foods, Inc., to CPC Int'l., Inc., to Unilever, and to Conopco, Inc., that it all becomes confusing to track the chain of title of (illusory) ownership to SKIPPY peanut butter.

Background History—A Complex Fraud Conspiracy

5. This Petition has an 81-year history dating to 1933, with a complex conspiracy that was concealed for decades from Petitioner, Percy Crosby's heirs, the courts, the USPTO, and other government agencies. It was not until years later – when Percy Crosby's daughter-administratrix (Joan Crosby Tibbetts) began an in-depth investigation and discovered the extraordinary circumstances behind the false imprisonment of Percy Crosby for the last 16 years of his life in a New York mental hospital (1949-64) – that the fraud cover-up began to unravel.

6. The key discovery in the PTO was two pages showing that Petitioner successfully opposed Rosefield's 1933 application to register SKIPPY for use in marketing peanut butter, when the Examiner of Interferences sustained Petitioner's opposition. *Skippy, Inc. v. Rosefield Packing Co., Ltd.*,

Opposition No. 13,134, decided January 9, 1934 (**Exhibit 1**). However, when the file was ordered, Tibbetts was told in 1976 that it had been destroyed in 1965-66. In January of 1977, she met with C. Morten Wendt, then the PTO Director of Trademark Examinations, to question the destruction. His words were instructive: "The Patent Office is red-faced with embarrassment that the file was destroyed. It never should have happened." He looked at The Lanham Act Rosefield Certificate, No. 0504,940, and said, "*The Patent Office had no authority to issue Rosefield that registration without an assignment from Skippy as opposer.*" He gave her a copy of the Trademark Rules, advised her to hire an attorney to have the mark cancelled, and agreed he would testify. However, when Wendt retired in 1978, unknown to Petitioner, he was hired by Mack Webner of Littlepage & Webner, whose client was Rosefield's assignee, Corn Products Refining Co. ("CPC," Rosefield's SKIPPY assignee). When Skippy, Inc. sued CPC in 1980, Wendt was served a subpoena duces tecum by CPC, but he did not reply or appear at trial.

7. Nor did Petitioner's lead counsel comply with his stated intention to disqualify Webner for a conflict of interest. So, when denying Skippy, Inc. injunctive relief and cancellation of Rosefield Reg. 0504,940, the 1980 *Skippy* court was unaware that the registration was void *ab initio* since its date of issue on December 21, 1948, 210 USPQ 589 (E.D. Va. 1980).

Conspiracy By Rosefield Et Al. To Obstruct Justice From 1934 Onward

8. At no time during the Skippy litigation did Petitioner's lead counsel, Stephen Trattner, show his client or the court the letters between Rosefield and its 1933 Chicago counsel, which were found during discovery. But Trattner phoned his client to ask, "Do you have any reason to believe that Rosefield was behind your father's false imprisonment and tax problems?" He refused to let his client see his new evidence, but said, "If Rosefield's counsel could see the letters I'm holding now he'd be turning over in his grave."

9. It was not until 1982 that Trattner was fired, on the advice of counsel for the New York Crosby estate, alleging “egregious misconduct” in that Petitioner found the concealed letters, especially the January 25, 1934 letter (**Exhibit 2**) and Jerome Rosefield’s letter of June 27, 1944 (**Exhibit 3**). The 1934 letter was written two weeks after the Examiner’s decision in favor of Petitioner; it accused Petitioner of coercion and threatened to complain to the Justice Department criminal division, “*should Skippy, Inc. ever attempt to exercise any legal action against our client.*” (italics supplied). Rosefield (then bankrupt) was advised to ignore the adverse decision and to continue using SKIPPY on the promise of being protected. The letter (**Exhibit 3**) from Jerome Rosefield repeats verbatim the above threat after receipt of the 1944 demand letter of Crosby/Skippy counsel (not produced). Rosefield’s request for protection notes, “As you can readily see, the matter is of the greatest importance to us as it threatens all of the effort and progress that we have made during the past ten years.”

10. Subsequent investigation and study of the wide influence of organized crime during the Great Depression – when Percy Crosby used his comic strip to satirize Al Capone and speak out against crime – revealed that Rosefield’s Chicago agent, Mida’s Trademark Bureau, was no ordinary firm specializing in intellectual property. It had mob ties to Prohibition bootleg liquor, and it had filed dozens of trademark applications and groundless oppositions in the PTO. One of its clients was CPC. Mida’s – whose letterhead claimed “17,000 Associates worldwide” and an unlisted number – referred to Rosefield (a former liquor dealer) as a “special friend” of the Bureau.

11. It’s no coincidence that the name and the copyrighted Skippy comic strip theme that Crosby used to criticize Capone was also used by Rosefield on its 1933 label (**Exhibit 4**), and was denied registration in 1934. Rosefield filed the exact same label in 1947 (with the addition of a 1944 copyright notice) that still exists on the register to this day. (**Exhibit 5**). Rosefield’s intent in 1934 and onward was not only to take over and infiltrate Petitioner’s lucrative Skippy licensing business (which included SKIPPY ice cream, candy, bread, and a cereal sponsoring the popular Skippy radio program), but also to

hitch a free ride off the good will Percy Crosby had created. *See, e.g.*, the 1932 flyer for “Percy Crosby’s SKIPPY Candy Bar” with legal notice (**Exhibit 6**).

Rosefield’s Siege of SKIPPY Before Filing Under The Lanham Act

12. In preparation for registering SKIPPY under the Lanham Act after already having been denied the right to do so, Rosefield in 1936 filed SKIPPY applications in all states, claiming as owner a product that was not even sold in those states. Thirty nine states had criminal penalties that Rosefield ignored. In 1939, Rosefield granted a patent license to a Minnesota firm, claiming “exclusive ownership of the trade name Skippy” (its patent expired in 1940). Meanwhile, Mida’s delivered on its threat to report Petitioner to the DOJ, falsely alleging tax evasion, and an audit began shortly after the Examiner’s decision in the PTO. That false complaint was intended to, and did, cripple Petitioner’s income, and was repeated in 1944 with Jerome Rosefield’s letter seeking a means to stop Petitioner from filing suit or affording counsel.

13. On or about December 17, 1948, Percy Crosby was suing Rosefield pro se in New York when he (Crosby) made an alleged suicide attempt. Four days later, the PTO issued Rosefield’s Certificate No. 0504,940. Crosby was committed to a New York State mental hospital without a hearing, counsel, or due process, and he was adjudicated incompetent. Attorney Rose Stein, whom Rosefield had hired in 1944 to befriend Crosby’s wife, made a pretense of helping Petitioner and was very hostile to Crosby, yet took over Skippy, Inc.’s affairs. Her real role (as Tibbetts realized years later, after suing her) was to ensure that Percy Crosby would never be released.

14. On February 8, 1968, New York Supreme Court Justice Saypol gave a stinging reprimand to defendant Stein, warning she could be “disbarred” for her unauthorized taking of Skippy property and mismanagement of Percy Crosby’s affairs. She was ordered to resign as Skippy president, to assign back to Skippy, Inc. property taken without court approval, and to release plaintiff-administratrix Tibbetts,

Petitioner, and heirs from future controversies and judgments. Notably, the court held that “any Skippy transaction without this court’s approval is null and void.”

15. Neither the court nor Petitioner knew at the time that 1) defendant Stein was Rosefield’s co-conspirator, or 2) that Rosefield’s assignee, CPC, was then a silent partner in the New York Supreme and Surrogate Court actions by the Crosby estate. This admission was made nineteen years later to a news reporter at CPC’s 1987 annual meeting, when Petitioner Tibbetts and stockholders made a public protest and distributed press releases. One month later, in May of 1987, the TTAB held that Petitioner’s Skippy service marks for the name and character would create “inevitable confusion,” denied the registrations, and found the applications “void ab initio” in favor of opposer CPC, 3 USPQ 2D 1456. Petitioner did not appeal, but did file a complaint to Congress that the Commissioner had no authority to give protection to the same SKIPPY mark that already had been prohibited registration under the 1905 Act.

Intent To Defraud The USPTO Was Successful

16. The foregoing is intended to show this Honorable Board that the many motions and arguments of CPC et al. and its counsel, Mack Webner, were intended to mislead the Board that Petitioner had no meritorious claim to seek cancellation of Registration 0504,940. Because neither the Board nor Petitioner had the advantage of seeing the original Skippy Opposition file, No. 13,134, or the losing applicant’s and its counsel’s letters in 1934 plotting to ignore the final decision of the Examiner of Interferences and retaliate against Petitioner, the Board’s dismissal with prejudice of Petitioner’s Cancellation No. 32, 070 in 2002 was in error. In that decision, it was noted that the 1954 summary of the opposition proceedings was “hearsay.” To the contrary, it was the only evidence that CPC grudgingly allowed Petitioner to see while deliberately concealing its own copy of the file (which its in-house counsel, Hanes Heller, admitted possessing in 1977). (**Exhibits 7 and 8**)

17. Thereafter, Heller, acting in concert with CPC management, used threats, intimidation, and extreme duress to demand that Tibbetts sign the option agreement with the now infamous “release clause,” and paid Petitioner \$25,000 for the option “to get her off our back.” The real purpose was to make it appear that Petitioner released Rosefield et al. from any liability for defying the Examiner’s 1934 decision, which had been deliberately concealed. CPC, knowing of Petitioner’s intent to seek cancellation, used that release as a litigation defense from 1980 onward, knowing full well it was unenforceable and against public policy. (Exhibit 9)

18. When Petitioner refused to comply with demands to recognize SKIPPY peanut butter’s rights, Tibbetts became the target of intimidation, extortion schemes, death threats, and tortious interference in her relationships with attorneys and licensees. The purpose of such predatory conduct was to disparage and destroy Petitioner’s credibility. Fortunately, on the pro bono advice of several attorneys who were convinced that the Skippy litigation beginning in 1980 was rigged (as was the former AUSA In E.D. Va.), Petitioner began researching RICO and anti-trust law to counteract Goliath’s bullying.

* * * * *

Respondent

19. Respondent, Hormel Foods, LLC (“Hormel”) is registered as a Delaware corporation, with its business located at 1 Hormel Pl., Austin, Minnesota, 55912-3680.

20. On January 3, 2013, Hormel issued press releases of its intent to buy Skippy from Unilever for \$700 million. Petitioner filed an immediate protest on its home page “PUBLIC PROTEST” and filed a complaint with the Justice Department Anti-Trust Division and FTC. The complaint noted that neither Rosefield nor its successors ever received an assignment of title and good will from Skippy, Inc. before Rosefield procured its 1948 SKIPPY registration. In particular, Petitioner alleged that Rosefield et al. were using SKIPPY to violate U.S. anti-trust laws, 15 U.S.C. § 1115(b)(7).

21. The sale closed on January 31, 2013 and Hormel recorded the assignments in the PTO while fully aware of the litigation history and Petitioner's website with thousands of visits worldwide. Hormel was also aware that Unilever (seller) had sued to shut down the Skippy website for contempt, alleging that the site violated the "final order" of the court in 651 F. Supp. 62 (E.D. Va. 1986). On appeal, the order was reversed, with the court finding that the case "raises serious First Amendment issues." 214 F.3d 456 (4th Cir. 2000). That decision set a precedent in First Amendment jurisprudence and cyberlaw. CPC decided it was too risky to appeal, having been seen as the bully, or to admit that Petitioner was entitled to payment.

22. Hormel's general counsel refused to discuss settlement to prevent further litigation, insisting that Hormel acquired a "valid title" to SKIPPY that dated back to 1933.

Petitioner's President Seeks Whistleblower Protection

23. In April of 2014, Joan Crosby Tibbetts filed a complaint with the SEC Office of Whistleblower, pursuant to 18 U.S.C. § 1513(e), as amended under the Sarbanes Oxley Act of 2002 § 1107 ("SOX"). On giving notice to Hormel, Tibbetts received no reply. This statute makes it a crime to interfere with an informant's livelihood in retaliation for truthful reporting of actual or possible wrongdoing.

24. The SEC special counsel was interested in Petitioner's complaint years earlier, stating, "If you can prove statutory authority to have CPC's Skippy mark cancelled, we will ask the Justice Department to investigate. . . . If the facts in your complaint are correct, it could empty CPC's back wallet pocket."

25. Neither Rosefield nor its successors ever had disclosed to the SEC that Rosefield's public offering, based on its SKIPPY registration, was permeated with fraud and in violation of the 1933 and 1934 Securities Exchange Acts. Instead, Percy Crosby's administratrix was targeted with threats and

years of malicious prosecution to cripple and destroy her livelihood – not unlike the predations against her father, which culminated in his confinement.

Hormel Files 3 SKIPPY Applications Under 18 U.S.C. § 1001

26. In July of 2014, Hormel filed 3 SKIPPY applications, claiming ownership of 0504,940 as assignee and stating the first date of use as February 1, 1933. SN 86/330000, 86/338555 and 86/337880 (the last, for SKIPPY YIPPEE, was filed under § 1(b) as ITU).

27. These applications are the latest evidence of a continuous pattern in restraint of trade to harass and interfere with Petitioner's policing efforts. Respondent's CEO told the press and investors the plan "to take Skippy out of the jar" and to use the name for other product licensing. Since 1927, the licensing of SKIPPY and its persona was the sine qua non of Petitioner's business and Percy Crosby's talents and skills.

28. Petitioner filed three Letters of Protest in September of 2014 (denied), a Request to Reconsider (denied), and Petition to the Director pursuant to 37 CFR § 2.146(a)(3) and (5), citing "extraordinary circumstances." It was also denied, advising Petitioner to file an inter partes claim in the TTAB, which granted a request for 90-day extension to oppose. As the extension expired on April 1, a timely request for 60-day extension was filed, but denied.

29. Since a petition to cancel under § 1064(3) can be asserted at any time (as under § 13 of the 1905 Act), and since cancellation is mandatory if there is fraud or if a registration was issued contrary to the prohibitions of an earlier Act (such as § 5(b), which prohibited Rosefield's application in 1934), Petitioner does not expect that this fourth attempt to cancel Reg. 0504,940 will result, as before, in dismissal "with prejudice."

Petitioner's Standing

30. In this Petition, Joan Crosby Tibbetts serves in her dual role as administratrix of the Percy Crosby Estate and as president of Skippy, Inc. Her fiduciary duties to the estate and to Skippy, Inc.

began on March 25, 1965, when the Surrogate Court of New York County granted her Letters of Administration. (Under New York law, she is an officer of the court.)

31. In view of the foregoing, it is clear that Petitioner has a real and serious interest in seeking long-overdue redress and repose from a serious miscarriage of justice and denial of due process.

Grounds For Cancellation Of Registration 0504,940

a) Rosefield Packing Co., aided and abetted by its Chicago counsel, knowingly and willfully filed the identical SKIPPY application in July, 1947, swearing that no other person, firm, or corporation had the right to the name, thereby deliberately withholding knowledge from the examiner that the Examiner of Interferences in 1934 already had denied Rosefield the right to register Petitioner's entire corporate name.

b) Rosefield also knew at the time of its application that Percy Crosby was suing Rosefield pro se in a New York court (which file CPC refused to produce, captioned *P. L. Crosby v. Rosefield: Skippy Infringement*) (italics supplied).

c) Rosefield also knew that Percy Crosby's alleged suicide attempt occurred four days before the PTO issued Certificate No. 0504,940, which was reported on national radio news. After the decision of the Examiner of Interferences in 1934, Rosefield showed malice and reckless indifference to the life and career of the celebrated creator of "Skippy," making no effort at restitution for willful infringement before Percy Crosby's death in 1964.

d) Jerome Rosefield submitted an intentionally fraudulent § 15 affidavit in 1954, swearing "there has been no final decision adverse to registrant's claim of ownership," when, only 10 years earlier in 1944, he had written his attorney to find a way to thwart Percy Crosby.

e) In 1955, with Rosefield's Skippy sale to Best Foods, Inc., Jerome Rosefield became president of Best Foods' "Skippy Division" and a director. Best Foods was advised before the acquisition

not to reveal its knowledge of the adverse 1934 decision if there was a future challenge to the validity of Rosefield's title to SKIPPY. The silence and denial continue to this date.

f) In 1964, ten months before Crosby's death, Rosefield et al., through a Chicago third party, tried to buy all Skippy assets without approval of the custodial New York court. This scheme was to prevent the Crosby estate from learning of Rosefield's Skippy enterprise. The plan failed because Percy Crosby died on that very date.

g) Destruction and/or concealment of key documents, including Skippy 1933-34 Opposition file 13,134.

h) Threatening Crosby administratrix with reprisal, or death, if she tried to cancel Rosefield registration, including filing groundless lawsuits.

i) Concealing knowledge that Reg. 0504,640 was void *ab initio*, but renewed 3 times.

j) It is against public policy to register a mark procured by fraud.

k) Fraud on the USPTO is a serious offense, not a private dispute.

WHEREFORE, Petitioner requests that this Honorable Board enter an Order that 1) cancels SKIPPY registration 0504,940 as procured by fraud, illegal, contrary to public policy, and thus null and void *ab initio*, 2) strikes SKIPPY registration 0504,940 from the register, and 3) grants such other and further relief that the Board deems warranted.

Respectfully submitted,

Date: *May-19, 2015*

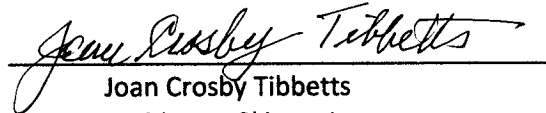


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CERTIFICATE OF SERVICE

___I hereby certify that the captioned document, "PETITION TO CANCEL", has been served via first class mail, postage prepaid, on Counsel for Respondent, Hormel Foods, LLC this 19th day of May, 2015 at the address of record below:

Lori J. Marco, Esquire
General Counsel
Hormel Foods, LLC
1 Hormel Pl.
Austin, Minnesota 55912-3680


Joan Crosby Tibbetts
Petitioner, Skippy, Inc.

ADDENDUM:

PETITIONER'S ARGUMENTS ARE NOT PRECLUDED BY EARLIER PROCEEDINGS

It is necessary to address the likelihood that Respondent and/or the Board will disregard Petitioner's arguments on the belief that they are precluded by res judicata or other, similar doctrines stemming from prior proceedings on these matters. This is a mistake for a variety of reasons, the first being that the January 9, 1934 decision by the Examiner of Interferences in favor of Petitioner constitutes the first ruling that is entitled to deference, yet which never has received it. Even if that ruling were again disregarded – which it should not be – there remains no valid basis to deny Petitioner's arguments the full and fair consideration they deserve.

A. No Res Judicata

Res judicata (also known as claim preclusion) prevents the assertion of a claim following judgment on the merits in a prior suit between the parties (or their privies) based on the same cause of action. "For the doctrine of res judicata to be applicable, there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits." *Martin v. Am. Bancorporation Retirement Plan*, 407 F.3d 643, 650 (4th Cir. 2005) (citation omitted).

Petitioner concedes that Respondent is the successor in interest to the same mark at issue in earlier legal proceedings involving Petitioner, and therefore Respondent is "in privity" with the prior holders of the mark in those proceedings, primarily CPC. *See, e.g., In re Jeter*, C/A No. 08-07872-HB, 2011 Bankr. LEXIS 4717, at *12 (Bankr. D.S.C. Dec. 2, 2011). Petitioner does not concede, however, being precluded from seeking cancellation of the mark. The reason is straightforward: the U.S. Court of Appeals for the Fourth Circuit vacated the judgment of the U.S. District Court for the Eastern District of Virginia finding that Respondent's mark was incontestable. The Fourth Circuit found as a matter of law that Rosefield had submitted a false affidavit when applying to the Patent Office to make the mark

incontestable, leaving Petitioner free to pursue its fraud theory thereafter. *Skippy, Inc. v. CPC Int'l, Inc.*, 674 F.2d 209, 216 (4th Cir. 1982), *vacating in part Skippy, Inc. v. CPC Int'l, Inc.*, No. 80-250-A, 1980 U.S. Dist. LEXIS 16876 (E.D. Va. Nov. 24, 1980) ("*Skippy I*"). Thereafter, the only thing Petitioner had to prove was that Rosefield knew the affidavit was false when submitting it. This is not difficult to do; ample evidence demonstrates that the affidavit was intentionally false, meaning fraudulent, making cancellation imperative. *See Robi v. Five Platters, Inc.*, 918 F.2d 1439, 1444 (9th Cir. 1990) (citing *Skippy*, 674 F.2d at 216). Yet every tribunal in which Petitioner has sought to make this showing after the 1982 ruling has been unwilling to entertain it. There is no justification for this, and it is long past time for the serious question of fraud to be considered.

As to the supposed preclusive effect of *Skippy I*, "a judgment that has been vacated on appeal is thereby deprived of all preclusive effect, both as to *res judicata* and collateral estoppel." *Baltimore Luggage Co. v. Samsonite Corp.*, 727 F. Supp. 202, 208 (D. Md. 1989) (citation omitted). Any doubt on this point has been resolved by CPC itself, who opposed remand to the district court following the Fourth Circuit's vacatur by arguing in part as follows:

- "A vacated judgment or order puts the parties in the same position as they were before trial."
- "In the captioned case, the circuit court vacated the district court judgment that CPC's trademark was incontestable. The vacation [sic] places the parties in the same position they were in before trial."
- "The purpose of vacating a decision below is 'so that it will spawn no legal consequences.'" (citation omitted)
- "'The effect of vacating the judgment below is to take away from it any precedential effect.'" (citation omitted)
- "'[V]acated findings have no vitality as precedent or res judicata in other litigation.'" (citation omitted)
- "The issue in a vacated judgment is 'alive' for another trial to the extent that it is not foreclosed by the doctrine of res judicata. The issue may be retried in a subsequent suit."

CPC Opp. to Final Order, attached hereto as **Exhibit 10**.

There was a second judicial proceeding in 1986 before the same district court that had decided *Skippy I*, specifically to address CPC's accusation that Petitioner was infringing on the mark by licensing the use of the SKIPPY name and imagery in conjunction with the sale of peanuts. *CPC Int'l, Inc. v. Skippy, Inc.*, 651 F. Supp. 62 (E.D. Va. 1986) ("*Skippy II*"). The adjudication of *Skippy II*, however, also does not prevent Petitioner from seeking cancellation, for an infringement dispute concerns distinct facts and issues that are not preclusive of a cancellation proceeding. *See Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1364 (Fed. Cir. 2000) ("This array of differences in transactional facts conclusively demonstrates that claim preclusion cannot serve to bar a petition for cancellation based upon an earlier infringement proceeding.") (multiple citations omitted).

In 2002 there was yet another decision by the same court, which erroneously cited *Skippy I* as precluding Petitioner from seeking to cancel the mark held by one of CPC's successors in interest. *Skippy, Inc. v. Lipton Invs., Inc.*, 345 F. Supp. 2d 585 (E.D. Va. 2002), *aff'd*, 74 Fed. Appx. 291 (4th Cir. 2003) ("*Skippy III*"). This was despite the Fourth Circuit's 1982 holding that Petitioner indeed could seek cancellation, achieving in one fell swoop the rejection of the law of the case and the denial of Petitioner's right to a full and fair opportunity to assert its claim. Moreover, the court in *Skippy III* should have conducted a de novo review of the entire record, which it did not do. *See Timex Group USA, Inc. v. Focarino*, 993 F. Supp. 2d 606 (E.D. Va. 2014) (finding fault with *Skippy III* and citing *Swatch AG v. Beehive Wholesale, LLC*, 12-2126, 739 F.3d 150, 2014 U.S. App. LEXIS 255, (4th Cir. Jan. 7, 2014). **"Redetermination of issues is warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation."** *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481, 102 S. Ct. 1883, 1897 (1982) (emphasis added). There is every reason to doubt the quality, extensiveness, and fairness of the prior proceedings here, for Petitioner had a right to make arguments seeking cancellation of the mark on the basis of fraud, but the courts turned a blind eye to them.

Moreover, the current petition relies in large part on evidence that Petitioner did not possess and could not have obtained on prior occasions, including the proceedings before this Board from 1982 to 1987 when Petitioner sought to register its own SKIPPY marks and was opposed by CPC. This serves as an independent basis to deny preclusive effect to those proceedings and to *Skippy III*. See *Saladino v. United States*, 62 Fed. Cl. 782, 792 (2004) (citing *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 914 (7th Cir. 1993); *Stone v. Williams*, 970 F.2d 1043, 1055 (2d Cir. 1992); *Guerrero v. Katzen*, 774 F.2d 506, 508 (D.C. Cir. 1985)). Further still, res judicata will not apply if the failure to assert a prior claim was the result of fraud, concealment, or misrepresentation of pertinent facts. See *Plotzker v. Lamberth*, Civil No. 3:08cv00027, 2008 U.S. Dist. LEXIS 86198, at *8-*9 (W.D. Va. Oct. 22, 2008) (citations omitted). This is especially true where misconduct by a party (such as CPC, as explained above herein) substantially changes the posture of a case. *Sarhan v. Dep't of Justice*, 2014-3197, 2015 U.S. App. LEXIS 5807, at *3 (Fed. Cir. Apr. 10, 2015) ("An exception to the doctrine of res judicata exists where there has been fraud, concealment, or misrepresentation by a party.") (citing *Anderson v. Dep't of Transp.*, 46 M.S.P.R. 341, 349 (1990), *aff'd*, 949 F.2d 404 (Fed. Cir. 1991)). As elaborated in *Anderson*, "under this exception, the [Merit Systems Protection] Board has the authority to reopen and reconsider a final decision that it has rendered, even after several years have passed, where there has been fraud, concealment, or misrepresentation by a party before the Board. Such circumstances shift the balance from the 'desirability of finality' to 'the public interest in reaching the right result,' . . . and thus warrant reopening and reconsideration." *Id.* at 349 (citation omitted).

Even the U.S. Court of Appeals for the Federal Circuit has held that res judicata does not apply when there has been an effective denial of due process stemming from another party's misconduct. *Pactiv Corp. v. Dow Chem. Co.*, 449 F.3d 1227, 1232-33 (Fed. Cir. 2006) (citing Restatement (Second) of Judgments § 26, cmt. j). The decades-long misconduct by Respondent's predecessors in interest – as detailed above herein – crippled Petitioner's ability to bring a full challenge to the mark's legitimacy,

making it even more improper to treat the earlier proceedings as definitive or preclusive. The collusion of Petitioner's former counsel, Stephen M. Trattner, with CPC to hinder Petitioner is yet another aggravating factor that renders res judicata inapplicable here. See Restatement (Second) of Judgments § 42(1)(e), cmt. f ("[A] judgment is not binding on the represented person where it is the product of collusion between the representative and the opposing party, or where, to the knowledge of the opposing party, the representative seeks to further his own interest at the expense of the represented person. Where the representative's management of the litigation is so grossly deficient as to be apparent to the opposing party, it likewise creates no justifiable reliance interest in the adjudication on the part of the opposing party.").

B. No Collateral Estoppel

Collateral estoppel (also known as issue preclusion) is related to res judicata but slightly more demanding, consisting of five elements: 1) the issue sought to be precluded is identical to one previously litigated; 2) the issue was actually determined in the prior proceeding; 3) the issue's determination was a critical and necessary part of the decision in the prior proceeding; 4) the prior judgment is final and valid; and 5) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. See *Westmoreland Coal Co. v. Sharpe*, 692 F.3d 317, 331 (4th Cir. 2012).

Again, as to the supposed preclusive effect of *Skippy I*, "a judgment that has been vacated on appeal is thereby deprived of all preclusive effect, both as to res judicata and collateral estoppel." *Baltimore Luggage*, 727 F. Supp. at 208 (D. Md. 1989). At no point after *Skippy I* was the issue of fraud actually determined in a proceeding, in disregard of the Fourth Circuit's holding that it could be; the subsequent decisions merely cited *Skippy I* and wrongly refused to consider the issue whenever Petitioner raised it.

Even if it were shown that an outright refusal to consider and rule on the merits of an issue constitutes “actual determination” of that issue for purposes of collateral estoppel, many of the same exceptions addressed above with regard to res judicata apply with equal force here. *See Kremer*, 456 U.S. at 481; *Saladino*, 62 Fed. Cl. at 792; *Pactiv*, 449 F.3d at 1232-33 (citing Restatement (Second) of Judgments § 26, cmt. j); Restatement (Second) of Judgments § 42(1)(e), cmt. f.

C. No Bar Related To Compulsory Counterclaims

The Respondent and/or the Board might disregard Petitioner’s cancellation petition on the belief that Petitioner had a duty to raise it as a counterclaim in prior proceedings, either in court or before the Board itself. This again is a mistake.

The 1986 infringement action by CPC in *Skippy II* did not obligate Petitioner to raise a counterclaim to cancel the mark, either under Rule 13(a) of the Federal Rules of Civil Procedure or under Trademark Rule 2.106(b)(2)(i), since an infringement claim is too distinct from a cancellation claim. *See Nasalok Coating Corp. v. Nylok Corp.*, 522 F.3d 1320, 1324-26 (Fed. Cir. 2008).

Additionally, Federal Rule 13(a) is worded to require a counterclaim “**against an opposing party[.]**” There is no allowance for parties “in privity” as with res judicata, so the fact that Respondent was not a party to any of the relevant proceedings makes Respondent ineligible to cite Rule 13(a) against Petitioner. *See Youell v. Grimes*, 203 F.R.D. 503, 507-08 (D. Kan. 2001). The Fourth Circuit once considered this issue and likewise refused to apply Rule 13(a) to bar a claim where the opposing parties in the two proceedings were not identical. *Fullerton Aircraft Sales & Rentals, Inc. v. Beech Aircraft Corp.*, 842 F.2d 717, 722-23 (4th Cir. 1988). The court stated in dicta that there might be an exception if, for example, a corporation and its president had an identity of interests that made them effectively the same party, thereby allowing one of them to assert preclusion to bar a claim in the second proceeding despite not having participated in the first one. Respondent has no such identity of interests with a party in the former proceedings, and thus no basis to assert preclusion on these grounds.

As for CPC's opposition to Petitioner's registration efforts before this Board, Respondent and/or the Board might reason that Trademark Rule 2.106(b)(2)(i) obligated Petitioner to raise a counterclaim of cancellation at that time. Once again, Respondent was not a party to those proceedings, which again makes the counterclaim bar inapplicable because the Board is obligated to use the same approach discussed above with regard to Federal Rule of Civil Procedure 13(a), as follows: "Except as otherwise provided, and wherever applicable and appropriate, procedure and practice in inter partes proceedings shall be governed by the Federal Rules of Civil Procedure." 37 C.F.R. § 2.116(a). Moreover, many of the grounds for the current petition were unknown during prior Board proceedings, again relieving Petitioner of raising them in a counterclaim at that time. *See Zawod v. SIA "Baltmark Invest"*, 1:12cv515 (JCC/IDD), 2013 U.S. Dist. LEXIS 168317, at *29-*30 (E.D. Va. Nov. 26, 2013). Last but not least, CPC argued in those very proceedings that the Fourth Circuit's decision for Petitioner was irrelevant, stating that "the incontestability of [CPC's] mark has no relevance to the opposition proceedings." CPC Response, Aug. 21, 1982 (**attached hereto as Exhibit 11**). It would violate basic principles of judicial estoppel for Respondent to argue that Petitioner had a duty to assert a counterclaim regarding the mark's contestability in the earlier proceedings – after all, Respondent's predecessor-in-interest (CPC) argued that this was inappropriate, and CPC gained an advantage and ultimately prevailed to Petitioner's detriment. *See Nat'l Union Fire Ins. Co. v. Allfirst Bank*, 282 F. Supp. 2d 339, 348 (D. Md. 2003) ("The doctrine of judicial estoppel precludes a party from asserting a position inconsistent with a position successfully taken by the same party or a party in privity in a prior lawsuit."); *see also Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1565 (Fed. Cir. 1996) ("The doctrine of judicial estoppel is that where a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have changed.").

D. No Bar Related To Petitioner's Release Of CPC

Finally, Respondent and/or the Board might conclude that Petitioner waived its rights to seek cancellation by executing a release in favor of CPC. There are serious questions regarding the release's validity, as the release was most likely procured by fraud and duress. Yet even assuming that the release is irreproachable, Respondent was not a party to it and has no right to invoke it, since it is in favor of CPC alone and contains no language extending the release to CPC's assignees, transferees, or anyone else. See **Exhibit 9**. Under the law of both New Jersey and Virginia (where the two parties resided), a release applies according to its plain language and *only* to the stated beneficiary thereof. See *Potomac Ins. Co. of Ill. ex rel. OneBeacon Ins. Co. v. Pennsylvania Mfrs.' Ass'n Ins. Co.*, 73 A.3d 465, 477-78 (N.J. 2013); *Berczek v. Erie Ins. Group*, 529 S.E.2d 89, 90-91 (Va. 2000).

E. Conclusion

This petition concerns serious matters that have not been given the serious consideration they deserve. Ever since the Fourth Circuit held *as a matter of law* that Rosefield's 1954 affidavit regarding the subject mark was false, and that Petitioner had a right to assert fraud to cancel the mark, Petitioner has run into a brick wall of disregard. The question facing the Board is simple yet fundamental: will it examine whether there is a fraudulent mark on the rolls, or will it place another brick in the wall to shield a suspect mark from scrutiny?

INDEX OF EXHIBITS –PETITION TO CANCEL

1. **PTO file of *Skippy, Inc. v. Rosefield Packing Co., Ltd.* Opp. 13,134 (1933-34)**
2. **Mida 1/25/34 threat to report Skippy to DOJ criminal division in reprisal, 2b) Rosefield 1/31/34 letter; 2c) Mida reply not to offer Skippy money,ignore PTO decision**
3. **Jerome Rosefield 6/27/44 letter repeats threat for reprisal; Mida 6/28/44 reply**
4. **Rosefield SKIPPY peanut butter label of 1933 copies SKIPPY comic strip theme (its basic patent for peanut butter expired in 1940)**
5. **Rosefield specimen SKIPPY label filed in 1947 application for 0504,940 remains to date. Crosby stylized lettering was finally abandoned in Oct. 1985, and label design totally altered., still claimed first use since 2/1/33**
6. **1932 color flyer of “Percy Crosby’s SKIPPY Candy” with legal notice mark registered in PTO**
7. **7/15/54 summary of Skippy opposition while PTO file existed is only evidence available**
8. **6/28/54 due diligence search of PTO records; report to Rosefield SKIPPY buyer BestFoods.**
9. **1978 Option Agreement with release clause procured by fraud and threats to Petitioner,refusing to show CPC’s copy of Skippy Opposition No. 13,134.**

ADDENDUM EXHIBITS

10. **CPC’s 1986 Opposition to Motion For Final Order (*Skippy, Inc. v. CPC*). This was during Petitioner’s pro se petition to cancel Rosefield reg. 0504,940 in 1986 that was dismissed. .**
11. **CPC counsel’s 8/21/02 reply to 4th Cir. Clerk; refusal to consent to certified order needed to comply with 15 U.S.C. §1119. Ex. 11b, 9/2/09 Skippy letter to 4th Cir, Clerk ordered required certified copy (that was sent in 2010 to PTO Solicitor—to correct the register).**

EXHIBIT 1

46

AUG 8 1933

Ser. No. 339,002. ROSEFIELD PACKING COMPANY, LTD.,
Alameda, Calif. Filed June 19, 1933.

SKIPPY

For Peanut Butter.
Claims use since Feb. 1, 1933.

Opp 13134 Sustained

EXHIBIT 1

13133	Yellow Company vs. Lane & Spindler	13,140	Recd. 10/30 D.C. 3/3
	Recd. 11/9/33 Ser. No. 336,102 Ob 33	Pub. 8/33 Comp. 3/34	Recd. 10/30 D.C. 3/3
13134	Skippy, Inc. vs. Rosefield Packing Co., Ltd.	13,141	Litro-Neural Recd. 11/33 D.C. 3/3
	Recd. 11/9/33 Ser. No. 339,002 Ob 33	Pub. 8/33 Comp. 3/34	Recd. 11/33 D.C. 3/3
13135	Bourjois, Inc. vs. National Cellulose Corporation	13,142	The Tindal Recd. 11/33 D.C. 3/3
	Recd. 11/9/33 Ser. No. 334,715 Ob 33	Pub. 8/33 Comp. 3/34	Recd. 11/33 D.C. 3/3
13136	Corning Glass Works vs. Inland Glass Works, Inc.	13,143	Goulds Cu Recd. 11/33 D.C. 3/3
	Recd. 11/9/33 Ser. No. 338,870 Ob 33	Pub. 8/33 Comp. 3/34	Recd. 11/33 D.C. 3/3
13137	Kopas Bros., Inc. vs. Ajax Hosiery Mills	13,144	Utica, Ind Recd. 11/33 D.C. 3/3
	Recd. 11/9/33 Ser. No. 329,170 Ob 33	Pub. 8/33 Comp. 3/34	Recd. 11/33 D.C. 3/3
13138	The Kroger Grocery & Baking Co. vs. M.K. Gietz Brewing Co.	13,145	The Bell-C Recd. 11/33 D.C. 3/3
	Recd. 11/9/33 Ser. No. 338,929 Ob 33	Pub. 8/33 Comp. 3/34	Recd. 11/33 D.C. 3/3

EXHIBIT 2 a-c

M I D A ' S

B U R E A U

Trade Marks and Patents

U. S. Department of
Commerce
Chicago

January 15, 1934.

VIA AIR MAIL

SAN FRANCISCO:

In re: "SKIPPY" of Rose Field
Packing Co. Ltd.

Have looked into the situation of this case and
in making the following recommendation am motivated by the
best interest of the client.

The negative outcome of the opposition is solely
upon the extreme technical ground that Skippy, Inc. obtained
a charter broadly drawn to comprehend its imaginary activities
as well as its real activities. The charter grants the privi-
lege to engage in merchandising, manufacture and sale, leaving
wide latitude as to the character of the merchandise. That
provision is in the nature of a rider or secondary thought to
the primary interest of the concern in controlling the name
"SKIPPY" for cartooning or other publication purposes. But
the fact remains that the privilege stated is embodied in the
charter and it was on the strength of this broad coverage that
the opposition examination reverted in favor of the opponents.

Appeal may or may not correct the decision unless
carried to the court. Appeal from the opposition division
passes directly to the Commissioner of Patents who, in this
instance, is quite powerless to reverse the decision as it
follows the general practice of the Patent Office. Re-appeal
to the jurisdiction of the U. S. Court of Customs and Patent
Appeals still remain in and follow the practice pertaining to
trade mark applications in the Patent Office.

Appeal would therefore have to be taken to a Federal
District Court to determine the commercial aspects rather than
the technical aspects but such an action would involve a long
drawn out procedure and accumulate expenses out of all
proportion to the exigencies of the matter which is merely that
of determining the right of registrability.

EXHIBIT 20

San Francisco:

-2-

You inform Mr. Rosefield that he can continue to use the mark without the least restriction or apprehension that he could be enjoined from such use. There are numerous precedent cases confirming this statement, such as the Teenie Weenie case where it was held that the proprietorship in the name "TEENIE WENIE" for cartooning purposes was unable to extend a control to the use of the name for branding commercial commodities such as canned fruits and vegetables. That case is directly parallel with the present instance with the sole exception that Skippy, Inc. rests its claim upon the broad specification in its corporate charter and that its corporate name was duly deposited in the archives of the Patent Office.

The deposit of the corporate name in the Patent Office does obstruct applications to register the corporate name as a trade mark for commodities embraced by the corporate grant.

It is entirely another matter to prove that a corporate grant to engage in a business but lacking any good will in such business shall, by virtue of the mere language of the corporate charter, prevent others from using the name commercially without the least provable or prospective injury to the corporation of such name.

The whole affair in raising the question by initiating an action of opposition smacks strongly of coercion. Subjects of that character come within the scope of the criminal branch of the Attorney General of the United States. The special assistant to the Attorney General was at my office yesterday investigating nefarious practices and the writer would have no hesitancy in placing the matter before that Department should Skippy, Inc. ever attempt to exercise any legal action against our client.

It is accordingly proposed that the client forego spending an additional dollar and forget this untoward incident that arose entirely out of thin air and without valid justification.

Sincerely,

(signed) L. W. Mida

President

LM:8

C O P Y (original copy from Best Foods legal files available)

Jan 31, 1934

Mida's Bureau
537 S. Dearborn St.
Chicago, Ill.

[Air Mail]

Gentlemen: Attention Mr. L. W. Mida, Pres.

Mr. Fallon relayed to us a copy of your Air Mail letter of January 25th in which you go into detail as to the opposition on Skippy Brand Peanut Butter.

Your letter has lifted quite a load from our minds as this has been an extremely vexatious problem to us. It goes without saying that we will follow your advice to the letter, that is, continue the use of this brand with out taking further action as regards completion of the registration in the United States patent office.

Of course, if there was a possibility of giving these people a couple of hundred dollars to withdraw their opposition, probably you would advise such action. We imagine, though, that they would demand a substantial sum for withdrawal of their opposition.

From your letter, we now understand that we can go ahead and use this brand, even though no registration has been granted to us. We take it that no one else would be in a position to register this trade-mark for use on peanut butter, which debar, we understand will also act against "Skippy, Inc.", the opposer of our registration.

We are also taking it for granted that should such a registration be proposed at some time in the future, that your office would duly notify us so that the registration would not be granted to someone else, because of our failure to be appraised of such proposed registration of the brand name "Skippy" for use on peanut butter.

May we take this occasion to thank you for your helpful advice and your personal interest in our problem. We also would like to take advantage of this letter to assure you of our best wishes for your future success, and our contribution towards same, as lies within our power.

Yours very truly,

Rosefield Packing Co. Ltd

J. L. Rosefield
MD

By _____

CC to Mr. T.J. Fallon

EXHIBIT 2b

SPECIALISTS IN TRADE MARK SECURITY THROUGHOUT THE WORLD - SERVING MORE THAN 10,000 CLIENTS

RECORDS OF TRADE MARK REGISTRATIONS
IN EVERY LINE SINCE 1872

Leo Wilham Mida
Bryant G. Richards
James L. Valentino
Paul M. Bartley
John E. Thompson



"Fudley's" Insurance
Telephone Marrison 3526
(Private Exchange)
7th Floor, Terminal Bldg.
537 S. Dearborn St.
Chicago

February 3, 1934

Rosefield Packing Co. Ltd.
Alameda, California

Gentlemen: Attention: Mr. J. L. Rosenfield
In re: "SKIPPY"

This acknowledges your letter of January 31st addressed to Mr. L. W. Mida, and we wish to thank you for your cordial appreciation of the efforts of this Bureau, in your behalf.

With reference to entering into any negotiation with the "Skippy" people with the view of paying them moderate sum for withdrawing their opposition, we deem this undesirable in that it might be interpreted as a recognition on your part of their alleged rights, which of course, you do not do.

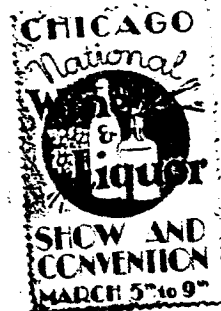
You are correct in your understanding that in our opinion you are entirely justified in proceeding with the use of the word "SKIPPY" as a trade mark for food products so long as you do not incorporate in your label any representation of the character "SKIPPY" as shown in the well known comic strips. Such use is, of course, protected under their copyright. The copyright protection, however, does not extend to the word "SKIPPY" apart from the comic strip character.

We are entering this brand in our vigilance files and it will be kept under constant surveillance. You will be advised promptly of any attempt to use this brand for food products, which may come to our attention, and such users will be informed of your superior rights through prior use.

Very truly yours,

M I D A ' S

Paul Bartley



FB:E

DEPT. EXHIBIT
For Ident. 124 in Evid.
Date:
Report:

EXHIBIT 3,3c

Air Mail

June 27, 1944

Mr. L. W. Mida,
Mida's Bureau
537 S. Dearborn
Chicago, Ill.

Dear Mr. Mida:

You will, no doubt, recall the correspondence and telephone conversations we had some years ago relative to our Skippy Brand for Peanut Butter. You will recall that our application for copyright of the brand was opposed by Mr. Percy L. Crosby, a cartoonist, on the grounds of impingement on his corporation "Skippy, Inc."

In your letter of January 25, 1934 in the next to the last paragraph you wrote as follows; "The whole affair in raising the question by initiating an action of opposition smacks strongly of coercion. Subjects of that character come within the scope of the criminal branch of the Attorney General of the United States. The special assistant to the Attorney General was at my office yesterday investigating nefarious practices and the writer would have no hesitancy in placing the matter before that Department should Skippy, Inc. ever attempt to exercise any legal action against our client."

In a letter of October 10, 1935, signed by your Mr. Paul Bartley, the letter closed with the following statement, "Should you receive further communications from Mr. Crosby or his representatives, please refer to us before responding."

We are in receipt of a registered letter from the firm of Wise, Corlett and Canfield representing Percy L. Crosby and Skippy, Inc. We enclose a copy of this letter. We feel that it is imperative that we make some response to this letter as quickly as possible but in view of your quoted suggestions - we are writing for your advice

EXHIBIT 3

Mr. L. W. Munn -2-

on this matter. We would appreciate your reviewing all of the files on this matter, giving us your suggestions at the earliest possible moment. As you can readily see, the matter is of the gravest importance to us as it threatens all of the effort and progress that we have made during the past ten years.

Sincerely,

ROSEFIELD PACKING CO. LTD.

JLR:MD

Enclosure:

*Signed by: Jerome Rosefield
who became Vice - Pres
Best Foods "Skipper" division*

Mr. Randall of the American
Institute, etc.

He gave me the correct address
of

Percy L. Crosby
King Feature Syndicate, Inc.,
235-E. 45th
New York City, N.Y.

6/27/44

FOUNDED 1869

MIDA'S

TRADE MARK SERVICES

HARRISON 8326
537 SOUTH DEARBORN STREET
CHICAGO (5)

AIR-MAIL

June 28, 1944

Rosefield Packing Co. Ltd.
1916 Webster Street
Alameda, California

ATTENTION: Mr. J. M. Rosefield

Gentlemen:

Your letter of June 27, with enclosure, addressed to Mr. L. W. Mida, is received. Mr. Mida is out of the City for a few days and we will bring the matter to his attention immediately upon his return.

In the meantime, please do not allow yourself to become too excited over the matter. It is suggested that you write Wise, Corlette & Canfield acknowledging receipt of their letter and simply state that all your trade mark matters are in the hands of Richards & Murray of Chicago, to whom you have forwarded their letter of protest and that they will hear in due course from the above mentioned attorneys.

If you care to, you might add that it is never your intention to infringe upon the rights of others and that your letter is not to be construed as admission of infringement and that further you will be guided by the above mentioned law firm's recommendation.

Very truly yours,

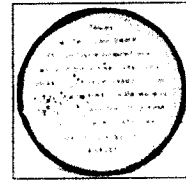
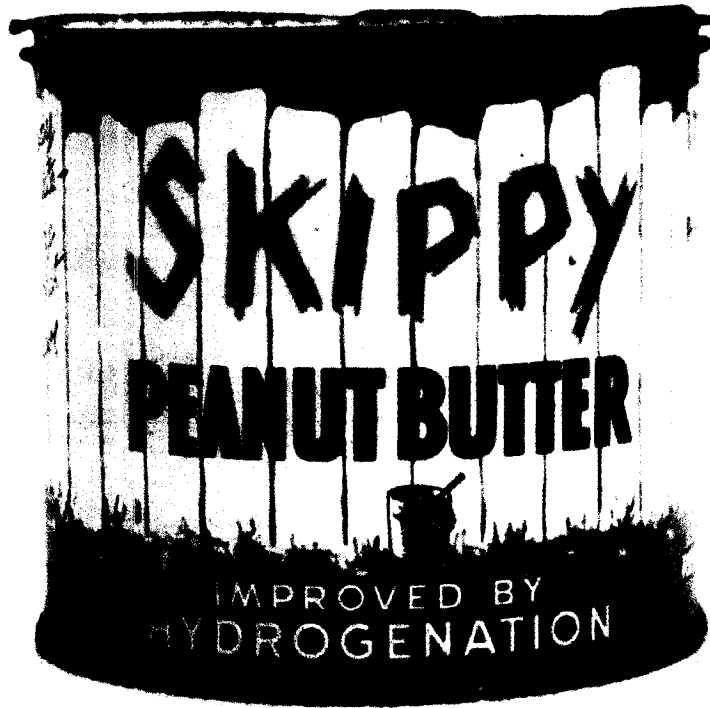
J. E. Simpson/cm

J. E. Simpson
MIDA'S TRADE MARK SERVICES
34th year

P. S. As our correspondence for 1934 and 1935 has been destroyed, please send us copies of all correspondence in connection with this matter.

Rechecked no further

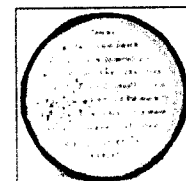
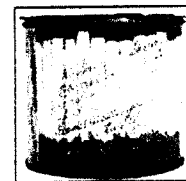
EXHIBIT 4



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FREE Counters and Services from Andale

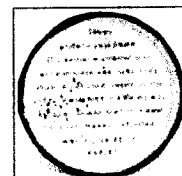
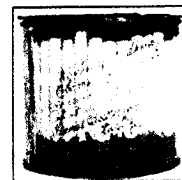
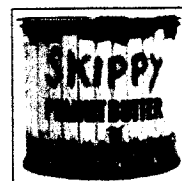
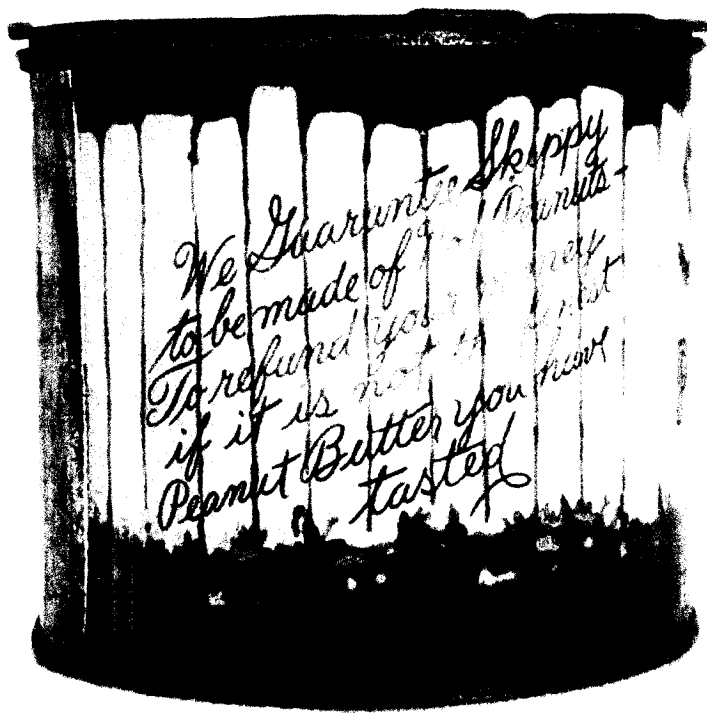
eBay item 7134143273 (Ends Feb-20-05 18:01:57 PST) - VINTAGE SKIPPY PEANUT ... Page 2 of 3



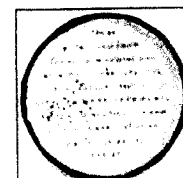
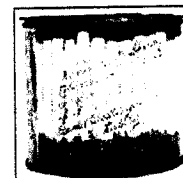
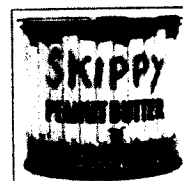
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FREE Counters and Services from Andale

EXHIBIT 4



FREE Counters and Services from Andale



FREE Counters and Services from Andale

EXHIBIT 5

Source: USPTO.gov - Principal Register

STAYS FRESH - NO OIL SEPARATION

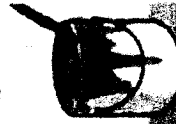
SKIPPY



PROCESS PATENTED

NET WT. 1 LB. MADE OF U. S. GRADE NO. 1 PEANUTS
SEASONED WITH SALT AND SUGAR

COPYRIGHTED 1944



US Reg. 504,940 Assigned to UNILEVER - 2000
Unilever sold/assigned to Hormel Foods Feb. 15, 2013



PERCY CROSBY'S

24 NET COUNT

SKIPPY 5¢

TRADE MARK REG. U. S. PAT. OFF.

AN "ELEGANT" CANDY BAR

MANUFACTURED BY BUNTE BROTHERS, CHICAGO—SAN FRANCISCO, U. S. A.

MILLIONS HAIL SKIPPY as their FRIEND and Now You Can Capitalize on this Tremendous Popularity

THERE is scarcely a boy, girl or grown-up in the United States or Canada who does not hail SKIPPY—as a friend.

Bunte Brothers accordingly take great pleasure in introducing to you—the prize-winning sensation of 1932 ~

Millions know Percy Crosby's loveable and famous character. Everything SKIPPY does or says is NEWS to them. Everything he turns his hand to is okay with them! SKIPPY is inimitable!

As a progressive candy dealer it isn't necessary to remind you of SKIPPY'S reputation—for bringing joy and gladness to the hearts of MILLIONS.

You will therefore welcome the opportunity of capitalizing in a big way upon SKIPPY'S far-reaching popularity.



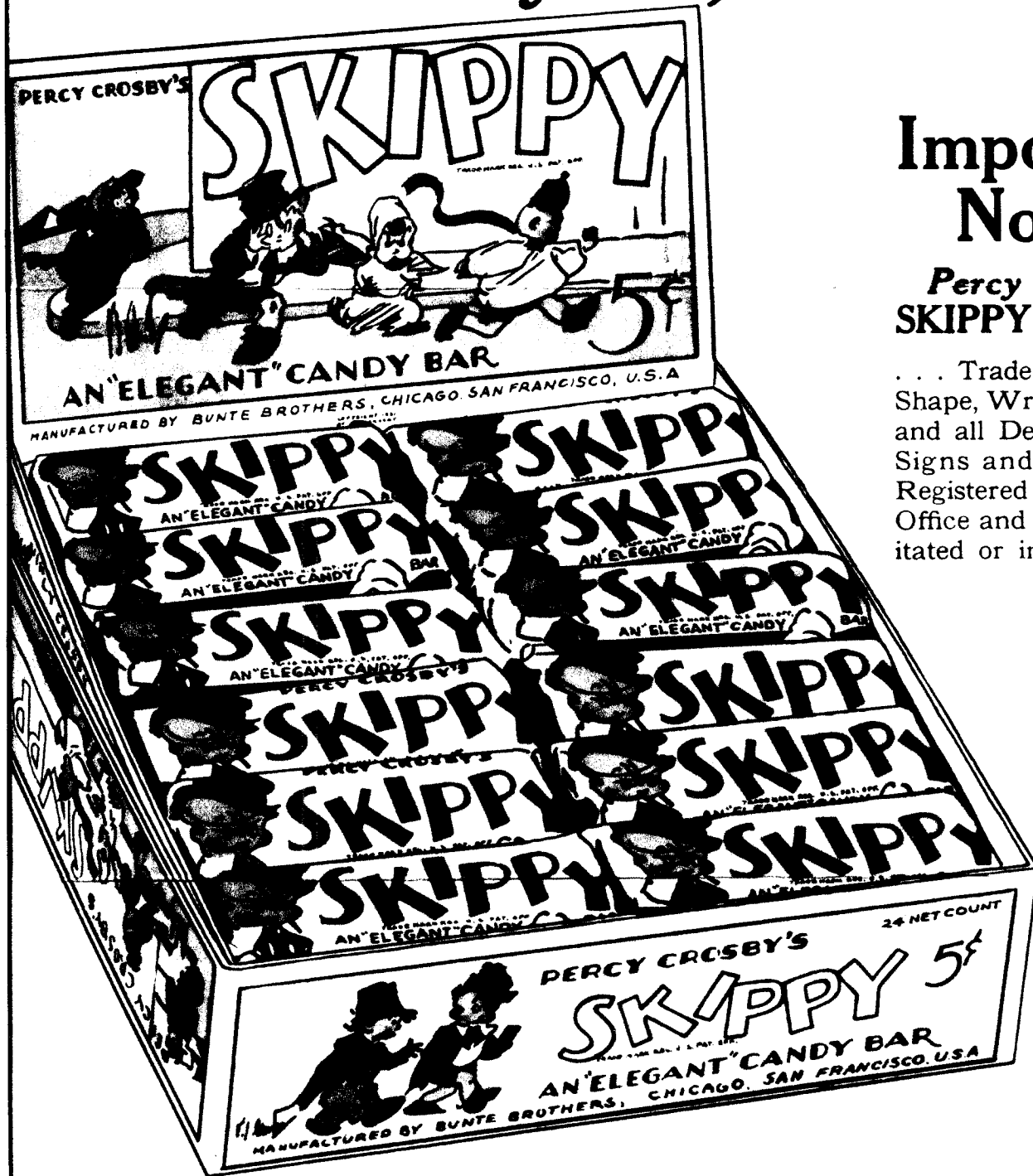
Actual
Size

PERCY CROSBY'S SKIPPY
Made by Bunte Brothers Chicago

EXHIBIT 6

Available to You

January 1st, 1932



Important Notice

Percy Crosby's
SKIPPY Candy Bar

. . . Trade Mark, Name, Shape, Wrapper, Carton and all Designs, Display Signs and Posters, are Registered by U.S. Patent Office and cannot be imitated or infringed upon

EXHIBIT 7

JAMES F. HOGE
GEORGE S. HILL
EDWARD S. STUCKERTON
ROBERT L. GRAHAM
GEORGE W. CHAPMAN
RAT. COFFEY JR.

MERCER L. STOCKELL
JAMES F. DOUGHERLONEY
WILLIAM F. WEIGEL
THOMAS J. STEPHENS

ROGERS, HOGE & HILLS
41 EAST 42ND STREET
NEW YORK 17

- PX 703

EDWARD S. ROGERS
675-1225

July 15, 1954

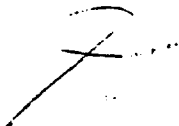
A. S. Yohalem, Esq.
The Best Foods, Inc.
1 East 43rd Street
New York 17, N. Y.

Re: SKIPPY

Dear Aaron:

I enclose Mr. Wenderoth's memorandum of the
14th together with copies of registrations referred to.
This confirms the information I gave you on the
telephone the other day.

Sincerely,



James F. Hoge
LH
Enc.

PX
703

EXHIBIT 7

ROGERS, HOGE & HILLS
900 F Street, N. W.
Washington 4, D. C.

MEMORANDUM

From E. F. Wenderoth
To James F. Hoge
Subject THE BEST FOODS, INC.
Trade-Mark SKIPPY

Dated

July 14, 1954

This is in response to your letter of July 7th, and the first part of this report is a confirmation of what I told you over the telephone on Friday morning, July 8th.

In the first place, the report made on June 29th contains the data regarding any and all registrations involving the term SKIPPY with regard to anything in the foodstuffs class, or the like.

No registration other than 504,940 dated Dec. 21, 1943 was found or appears ever to have been granted to Rosefield Packing Company, Ltd. The notation "(Pr. Reg.)" stands for "Principal Register". The registrant does not have any prior registration.

In view of your letter referring to a corporation Good Foods, a search was made of the Assignment Records with respect to that name, and as you were told over the phone, the records show that at one time there was a corporation of Florida, Good Foods Inc., who had 3 registrations which they in October 1936 assigned to Stokely Bros. & Co. Inc., an Indiana corporation, of Indianapolis, Indiana. With the assignment went the right to use the name "GOOD FOODS INC." and also the words "GOOD FOODS". The three marks transferred at that time are as follows:-

CITRU SIP
No. 327,957 - Sept. 10, 1935
Good Foods, Incorporated, Tampa, Florida
on Non-Alcoholic, Maltless, Citrus Fruit Juices - Cl. 45

REALLY FINE
No. 338,902 - Sept. 15, 1936 (1920 Act)
Good Foods, Incorporated, Tampa, Fla.
for Canned Citrus Products - Class 46

KAN-A-GOOD
No. 316,450 - Aug. 28, 1934
Good Foods, Incorporated, Tampa, Fla.
for Canned Grapefruit and Grapefruit Juice - Class 46.

The above of course is not the corporation in which you apparently are interested. The Assignment Records show the following:-

By a Change of Name dated June 22, 1952, recorded Sept. 30, 1952 at Liber 2-232, page 137, Erickson Food Products Company, a corporation of Minnesota, changed its name to Good Foods Inc.

The records also show that Good Foods Inc., formerly known as Erickson Food Products Company, assigned trade-mark 342,594 dated Jan. 19, 1937 to William K. Kuehn of 5725 Highway No. 7, Minneapolis, Minn. The assignment is dated Oct. 16, 1952, recorded Oct. 29, 1952 at Liber Q-233, page 274.

The mark transferred as indicated is the following:-

PEANETTE
No. 342,594 - Jan. 19, 1937
Erickson Food Products Co., Minneapolis, Minn.
for Peanut Butter - Class 46.

There is nothing in the records to indicate any connection between the later Good Foods Inc. with Rosefield. It is understood, of course, that "Licenses" need not be recorded because, as a rule, Licenses do not affect the title to either patents and/or trade-marks.

Only this morning was I able to inspect the opposition No. 13,134 reported to you in the original report of June 29th as having been filed by Skippy Inc. against the old Rosefield application Ser. No. 339,002 filed July 19, 1933 in which Rosefield Packing Company, Ltd. tried to register SKIPPY on peanut butter.

From the opposition file it is noted that the opposition was filed Sept. 6, 1933 with B. F. Foster of Washington, D.C. as attorney. The basis of the opposition was the "Name Clause" Section 5 of the 1905 Trade-Mark Act, and to the opposition papers there was attached a copy of the certificate of incorporation of Skippy, Inc. Attorneys Mida, Richards and Valentine, on behalf of the applicant Rosefield, in the later part of Nov. 1933 filed a Motion to Dismiss the opposition. When briefs were called for Rosefield filed a brief in support of the Motion to Dismiss alleging that the opposer Skippy, Inc. had failed to allege any damage, didn't deal in foodstuffs, etc. At the same time the opposer filed a brief in support of its motion.

On the same day that opposer filed its brief, it also filed a "Motion to Transmit" the application back to the trade-mark examiner, pointing out that on Sept. 6, 1933 (the date when the opposition was filed), Skippy Inc. had recorded its Articles of Incorporation in the Patent Office.

The Examiner of Interferences the following day, Dec. 9, directed the applicant to either answer the opposition or to waive its answer and go to hearing on the Motion to Dismiss. The Examiner of Interferences also 3 days later refused to act on the Motion to Transmit, pointing out that there was no provision for such an action in opposition proceedings, and furthermore that the Examiner of Interferences has jurisdiction to determine the right of registration.

Thereupon the applicant waived its right to answer and agreed to have the matter set down on the Motion to dismiss. Hearings were set for Dec. 28, 1933. The same date that the day of hearing was set, the opposer filed a Motion for Judgment on the Record. The examiner postponed consideration of the Motion for Judgment to Final Hearing.

Briefs were filed by both parties, and while applicant was not represented at the hearing, the opposer's counsel was present and argued against the Motion to Dismiss.

By a decision dated Jan. 9, 1934 the opposition was sustained, the examiner holding that the opposer was qualified under Section 5 (the Name Clause) of the 1905 Act. Limit of Appeal was set to expire Feb. 9, 1934 and as no appeal was filed, the decision became final.

Debit note is enclosed covering the rush-special services, the telephoned report, and this complete report.

EFW:jas

Enc. 4 printed copies
and debit note

EXHIBIT 8

ROGERS, HOGG & HILLS
900 F Street, N. W.
Washington 4, D. C.

MEMORANDUM

From Mr. Wenderoth
To Mr. Hogg
Subject THE BEST FOODS, INC.
Trade-Mark "SKIPPY"

Dated
June 29, 1954

In accordance with the request of Mrs. Stoughton dated June 24th, a search has been made through the records of the Patent Office for registrations involving the word SKIPPY and in particular any in the name of The Rosefield Packing Company.

The following are the registrations that were noted:-

SKIPPY
No. 263,240 - Nov. 5, 1929 (expired)
General Ice Cream Corp., Schenectady, N.Y.
for Ice Cream and Ices - Class 46

SKIPPY and design
No. 289,300 - Nov. 21, 1931 (expired)
Dr. W. J. Koss Co., d/b/a Hollywood Packing Co.,
Norwalk, Calif. for Dog and Cat Food - Class 46

SKIPPY and Design
No. 372,241 - Oct. 24, 1939
Gunmakers of America, Inc., Clifton Heights, Pa.
for Chewing Gum - Class 46.

SKIPPY BOY and Design
No. 1,00,770 - Mar. 30, 1943
Bonnie Earl Stewart d/b/a Stewart's Orange & Nut Shop,
Memphis, Tenn. for Pralines - Class 46.

SKIPPY
No. 504,940 - Dec. 21, 1948 (Pr. Reg.)
Rosefield Packing Company, Ltd., Alameda, Calif.
for Peanut Butter - Class 46.

SKIPPY
No. 541,067 - Apr. 17, 1951 (Pr. Reg.)
Dallas B. Lewis d/b/a Skippy Pet Food Co., Los Angeles
Calif. for Dog and Cat Food - Class 46.

It will be noted that 504,940 taken out in 1948 is to the company specifically referred to by Mrs. Stoughton and is on peanut butter.

EXHIBIT 8

The search also revealed that there is of record a certified copy of the Articles of Incorporation of Skippy, Inc. of Wilmington, Delaware, incorporated in Delaware May 11, 1932. The corporation is chartered to manufacture, purchase and otherwise deal in etc. books, periodicals, magazines, newspapers etc. and "to transact a general printing and publishing business". The certified copy is recorded under No. 3006 and was left for record on Sept. 6, 1933.

The search on SKIPPY was carried through the published marks and it appears that on Aug. 8, 1933 there was published for opposition purposes the application to register SKIPPY Ser. No. 339,002 filed June 19, 1933 by Rosefield Packing Company, Ltd. of Alameda, Calif., the mark being used on peanut butter. This application for registration was opposed - opposition 13134 - by Skippy, Inc. (the corporation referred to hereinabove) and the opposition was sustained Jan. 9, 1934.

It will be noted that the present registration to Rosefield is under the new Act which contains no provision for preventing the registration of a mark which also the the name of a corporation.

As the request of Mrs. Stoughton asked for the search not only on SKIPPY in the foodstuffs class, but also on registrations "closely related to it", we also noted a number of registrations involving the term SKIPPER. These are as follows:-

SKIPPER and Design
No. 43,871 - Dec. 20, 1904 (renewed)
Angus Watson & Co., Newcastle-upon-Tyne, England
for Sardines - Class 46.

SKIPPER and Design (CANCELLED)
No. 63,451 - June 18, 1907 (renewed & re-renewed)
Angus Watson & Co. (America) Limited, San Francisco,
Calif. - for Sardines - Class 46.

SKIPPER and Design
No. 72,122 - Jan. 5, 1909 (renewed and expired)
New England Cranberry Sales Co., Middleboro, Mass.
for Cranberries - Class 46.

SKIPPER
No. 104,120 - May 4, 1915 (renewed & Repub.)
Fisher Flouring Mills Co., Harbor Island, Seattle, Wash
for Wheat Flour - Class 46.

SKIPPER and Design
No. 241,606 - May 1, 1928 (expired)
Metro Chocolate Co. Inc., Brooklyn, N.Y.
for Chocolate covered candy bar - Class 46.

SKIPPER
No. 246,659 - Sept. 11, 1928 (expired)
Hans P. Larsen, Salinas, Calif.
for Condiments - Class 46.

Chambers' ANTI-SKIPPER COMPOUND
No. 258,540 - July 9, 1929 (renewed)
Chambers-Godfrey Mfg. Co., Martin, Tenn.
for Antiskipper compound to prevent skippers on
cured meats - Class 6.

SKIPPER and Design
No. 268,682 - Mar. 18, 1930 (expired)
Angus Watson & Co. (America) Ltd., San Francisco, Calif.
for Canned Caviar - Class 46.

SKIPPER and Design
No. 268,685 - Mar. 18, 1930 (expired)
Angus Watson & Co. (America) Ltd., San Francisco, Calif.
for Canned Snacks, Kipperred Herring, and Crab Meat -
Class 46.

"OLE SKIPPER"
No. 293,547 - Apr. 26, 1932 (expired)
M. Covitz & Son, Boston, Mass.
for Malt Syrup - Class 46.

SKIPPER and Design
No. 526,089 - June 6, 1950 (Pr. Reg.)
New England Cranberry Sales Co., Middleboro, Mass.
for Fresh Cranberries - Class 46.

LITTLE SKIPPER and Design
No. 557,229 - Apr. 8, 1952 (Pr. Reg.)
Parkview Markets, Inc., Cincinnati, Ohio
for Canned Vegetables - Class 46.

★
Inspection of the file of the Rosefield registration
504,940 shows that when it was filed in July 1947 the goods were
described as "peanut butter and canned cat and dog food". In
the first action registration was refused on the mark SKIPPER
289,300 Nov. 24, 1931 in the name of Dr. W. J. Ross Co. on "dog
and cat food". Thereupon by amendment in April 1948 the attorneys
cancelled the words "and cat and dog food" from the list of goods
and asked that the citation be withdrawn. The mark was then sent
to publication and eventual registration.

A search of the Assignment Records shows no instruments recorded affecting any trade-marks to or from Rosefield Packing Company Ltd.

There is an early record showing that Joseph L. Rosefield who signed the application resulting in the SKIPPY registration 504,940 changed his name by Court Order from Joseph L. Rosenfield.

The inventor Rosefield is co-inventor with several others in three or four patents as follows:

1,716,152
2,402,915
2,215,011 and
2,447,387.

There may even be others but the list of patents has not been checked.

Patent 2,402,915 dated June 15, 1946 by assignment dated Aug. 30, 1946, recorded Apr. 6, 1947 at Liber F-211 page 162, was assigned by the inventors J. L. Rosefield and Fitzhugh L. Avern to Rosefield Packing Company, Ltd. Therefore the company is also the record owner of this patent.

There is also on record a pending application on a "Method of Treating Edible Oil, Fats, etc." in which Rosefield has an interest.

Printed copies of the various registrations referred to are enclosed together with debit note for services.

EFW:jas

Enc. 2 sets of printed copies
and debit note

EXHIBIT 9

Px 65

OPTION AGREEMENT

This agreement entered into by and between CPC International, Inc. (hereinafter "CPC"), having a place of business at International Plaza, Englewood Cliffs, New Jersey 07632, and Skippy, Inc. (hereinafter "Skippy"), having a place of business at 11900 St. Johnsbury Court, Reston, Virginia 22091:

WITNESSETH:

Whereas, Skippy owns various comic^s, cartoons, and artwork portraying the cartoon character "Skippy", which is copyrighted or otherwise, and hereinafter referred to as "the Property";

Whereas, CPC desires to obtain an option to acquire an exclusive license to use the Property in the promotion and advertising of its food products, notably Skippy peanut butter;

Whereas, heretofore, CPC and Skippy have had differences and controversies pertaining to the use of the Property, and desire to enter into a settlement and accord and satisfaction thereof;

Now therefore, in consideration of the mutual covenants and promises herein set forth, CPC and Skippy agree as follows:

1. Skippy hereby grants to CPC a non-transferrable option to obtain an exclusive license to use the Property in the promotion and advertisement of food products marketed by CPC or its subsidiaries.

2. Skippy agrees not to grant a similar option or license to third parties, provided, however, that nothing in this agreement shall preclude Skippy from licensing the Property for literary, motion picture, or other visual reproduction for purposes, other than the commercial promotion and advertising of food products. A television program depicting the character "Skippy" and sponsored by a party which advertises food products shall not be deemed to be a "commercial production or advertisement of food products" within the meaning of this paragraph, so long as the Property is not used by such sponsor in the promotion of its food products.

The parties agree to cooperate in the enforcement of any rights

name, or word "Skippy" or the use of the Property, provided that nothing herein shall be construed to obligate either party to commence or defend an action, or expend any monies in the commencement or defense thereof.

4. a. Skippy hereby grants to CPC the right to review the Property from time to time at such reasonable times and places as may be mutually convenient and agreed.

b. CPC agrees to reimburse Skippy all reasonable expenses, approved in advance by CPC in writing, which are incurred in connection with CPC's inspection of the Property.

c. In the event that any cartoons, comics, or artwork are to be placed in the possession of CPC, CPC agrees to maintain sufficient insurance coverage to protect such cartoons, comics, or artwork from loss, damage, or destruction.

* 5. Skippy hereby releases and agrees to hold CPC harmless from any and all differences and controversies which may have existed in the past or may now exist between Skippy and CPC as relates to the use of the Property or use of the name "Skippy".

6. In consideration of the undertakings of Skippy hereunder, CPC agrees to pay Skippy the sum of Twenty-five Thousand Dollars (\$25,000) upon the effective date of this agreement.

7. a. The term of this option shall be for two years from the effective date hereof.

b. This option may be exercised by written notice to Skippy, Inc. at 11900 St. Johnsbury Court, Reston, Virginia 22091.

8. In the event that CPC elects to exercise this option, CPC and Skippy agree to negotiate a definitive license agreement, including a reasonable royalty for any commercial use of the Property by CPC, it being expressly acknowledged that CPC has no right to use the Property except on the negotiation of a license and payment of royalties.

9. This instrument contains the entire agreement between the parties hereto. This agreement may not be modified or amended except in writing signed by the parties hereto.

In witness hereof, the parties hereto have respectively caused this agreement to be executed by their duly authorized officers. The effective date of this agreement shall be the last date of signing hereinbelow.

BEST FOODS DIVISION
CPC INTERNATIONAL INC.

JAN. 3 1978
Date

By R.W. Sebrasse
Title: GROUP VICE PRESIDENT - MARK

SKIPFY, INC.

December 13, 1977
Date

By Joan C. Tibbitts
Title: President

EXHIBIT 10

EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Skippy, Inc.)	
)	
Plaintiff,)	
)	
vs.)	Case No. 80-250-A
)	
CPC International Inc.)	
)	
Defendant.)	

OPPOSITION TO MOTION FOR FINAL ORDER

Defendant, CPC International Inc., (hereafter CPC) opposes the motion of plaintiff, Skippy, Inc., (hereafter S.I.) for entry of a final order.

ARGUMENT

The captioned case was decided at the trial level, in this court, on November 24, 1980. 210 U.S.P.Q. 589 (E.D.Va. 1980). The decision was appealed to the Fourth Circuit Court of Appeals which decided the appeal on March 5, 1982. 674 F.2d 209 (4th Cir. 1982). A request for rehearing in banc was denied and a petition for writ of certiorari was denied on November 1, 1982. 459 U.S. 969 (1982).

Six years after the trial court ruled, four years after the Fourth Circuit decision and three-and-one-half years after denial of the plaintiff's writ of certiorari, the plaintiff, Skippy, Inc. (hereafter S.I.) seeks to have this court re-open the case and by some act of legerdemain change the decision of the circuit

The "Mandate Rule" Precludes A District Court From Altering A Decision Of The Circuit Court

The district court is without power to change the decision or holding of an appellate court.^{1/}

The "mandate rule is broader than the law of the case; the district court may no more exceed the directions of the mandate by retrying facts or altering its findings than by disregarding the law as decided by the appellate court". 1B Moore's Federal Practice, ¶404 [10] at 173-174.

Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. After a mandate, no rehearing will be granted, and on a subsequent appeal, nothing is brought up, but the proceeding subsequent to the mandate.

Illinois v. Illinois Central R.R. Co., 184 U.S. 77, 91 (1902) (cited at p. 2 of plaintiff's brief) quoting from Sibbald v. United States, 12 Pet. 488, 492, 9 L. Ed. 1167 (1838).

The Fourth Circuit did not remand. The Fourth Circuit did not reverse. The district court had nothing further to do.

^{1/} Rule 60 Fed. R. Civ. P. provides procedures for the district court to correct its own judgment by motion of a party but there is no rule, statute or jurisprudence enabling the district court to change a holding of an appellate court. See e.g. Willie v. Continental Oil Company, 746 F.2d 1041 (5th Cir. 1984).

Judge Lewis' letter referenced by S.I., was gratuitous. It was, in any event, premature because S.I. sought a rehearing in banc and then petitioned for a writ of certiorari to the Fourth Circuit after the appeal. The Judge's letter was gratuitous and improper because it exceeded the mandate of the Fourth Circuit which did not return the case to this court for further action.

S.I.'s Motion Seeks To Change The Decision Of The Circuit Court From "Vacated" To "Reversed"

The judgment of the Fourth Circuit Court of Appeals is correctly set forth by plaintiff and is shown in the photocopy of the reported decision attached to plaintiff's memorandum; namely, "AFFIRMED IN PART, VACATED IN PART". The Fourth Circuit held, after discussing the facts, "that portion of the district court's order granting CPC a declaratory judgment that its rights in the mark Skippy had been incontestable must be vacated". (emphasis in the original) The circuit court's judgment, quoted above, did just that. It vacated the district court's order granting CPC's declaratory judgment. [A vacated judgment or order puts the parties in the same position as they were before trial] There is nothing further for the district court to do. There is nothing further the district court can do.

[A vacated judgment requires no further act and permits of no further act.] In the captioned case, the circuit court vacated the district court judgment that CPC's trademark was incontestable.

[The vacation places the parties in the same position they were in before trial.] The purpose of vacating a decision below is "so that

it will spawn no legal consequences". Lebus v. Seafarer's International Union, 398 F.2d 281, 283 (5th Cir. 1968). "The effect of vacating the judgment below is to take away from it any precedential effect". Troy State University v. Dickey, 402 F.2d 515, 516 (5th Cir. 1968). "[V]acated findings have no vitality as precedent or res judicata in other litigation". Hill v. Western Electric Co. 672 F.2d 381 (4th Cir. 1982); 1B Moore's Federal Practice ¶416 [2] at 517. Even the cases cited by the S.I. hold in accord with the foregoing. For example, "[t]he Supreme Court has long held to a general rule that the mandate of an appellate court forecloses the lower court from reconsidering the matters determined above". Banco Nacional de Cuba v. Farr, 243 F. Supp. 957, 970 (S.D.N.Y. 1965) Aff.'d 383 F.2d 166, 177 (2d Cir. 1967) cited at page 3 of S.I.'s memorandum.

S.I.'s own language explains the effect of a reversal and/or alter vacation of a judgment. "Where an appellate court 'reverses' or 'vacates' a judgment of a lower court, the issue involved is alive and the general rule is that it may, if necessary, be retried even though there is no express provision for retrial in the appellate decision". For this conclusion S.I. cites Illinois v. Illinois R.R. Co., supra. While the proposition is, generally, correct, S.I. misconstrues it. [The issue in a vacated judgment is "alive" for another trial to the extent that it is not foreclosed by the doctrine of res judicata. The issue may

the same suit if there has been no remand mandated. Certainly, the judgment cannot be retried and reversed on motion under the guise of a "housekeeping" detail.

Conclusion

S.I. would have this court add the word "remanded" to the Fourth Circuit decision; and then have this court undertake the affirmative act of declaring that CPC's federal trademark registration is contestable and then take the further affirmative act of so informing the United States Patent and Trademark Office.

The motion is bizarre.

The acts S.I. seeks of this court in its motion would change the circuit court holding in part of this case from "vacated" to "reversed". S.I. not only has the temerity to seek this astonishing result, but to suggest to this court that such action by the court would be "essentially a 'housekeeping' matter".

S.I.'s motion is meritless. S.I. cites no Rule, no case, no statute and no other authority for the motion or for the result it seeks. After four to six years, the only reason for this motion being filed is to cause CPC expense and to attempt to influence a presently pending action in this court involving these same parties.

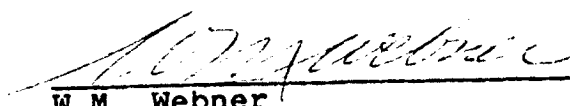
The motion must be denied.

- 6 -

Because this motion is not "well grounded" nor "warranted by existing law nor a good faith argument" CPC will, by motion, seek sanctions under Rule 11, Fed. R. Civ. P.

Respectfully submitted,

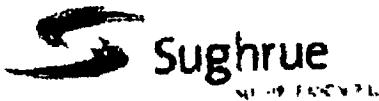
May 28, 1986


W.M. Webner
Nies, Webner, Kurz & Bergert
Suite 700
1911 Jefferson Davis Highway
Arlington, Virginia 22202
Telephone: (703) 521-6590

B26/NN2(a)

*N.B.
Markings made
by John Snuck, Esq.
in 1986
JET*

EXHIBIT 11a, b



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August 21, 2002

Patricia S. Connor
Clerk
United States Court of Appeals
for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse Annex
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

*N.D.
H. K. Sears Ltd already
filed on 8/19/02 a
brief of PTD dismissal of
Sears' petition in U.S. Dist.
Court for the District of
Columbia. Not for appeal.
Webner or "Client"
JTS*

Re: 81-1043 and 81-1044 Skippy, Inc. v. CPC International

Dear Ms. Connor:

Thank you for your letter of August 2, 2002, and the opportunity to respond to the enclosed *ex parte* reexamination of Ms. Sears of July 3, 2002, inquiring of a method to have a 20 year old decision of the Federal Circuit Court of Appeals certified to the United States Patent and Trademark Office. Ms. Sears provides no reason for her request and she provides no indication of her standing to seek the action she requests.

In any event, it does not appear to us that filing a certified copy of the decision of the Circuit Court is either appropriate or necessary. In its 1982 decision, the Court did not order the Director of Patents and Trademarks to take any action relative to the registration. It merely vacated a portion of the district court's ruling. The statute (15 U.S.C. § 1119) cited by Ms. Sears is permissive, but does not require that courts take any action. In this case the decision of the Circuit Court merely vacated part of the district court's order leaving nothing for the Circuit Court, the district court, the Director of Patents and Trademarks or the parties to do. As Ms. Sears notes, her client sought the entry of an order to the Director of Patents and Trademarks in 1986, and the motion was denied because there was nothing for the court to do.

It would be an unfortunate waste of judicial time and the resources of her client and our client should Ms. Sears pursue an effort to reopen this matter. The Fourth Circuit's decision is published at 674 F.2d 209 (1982). Ms. Sears may rely on it for any appropriate purpose. Thus, it appears to us that this request is little more than intermeddling and we do object to it.

Very truly yours,

W. Mack Webner

cc: M. H. Sears, Esq.

EXHIBIT 11 a.



September 2, 2009

Patricia S. Connor
Clerk
United States Court of Appeals
for the Fourth Circuit
Lewis F. Powell, Jr. United States Courthouse Annex
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

RE: 81-1043 and 81-1044 Skippy, Inc. v. CPC International, Inc. (674 F.2d 209)

Dear Ms. Connor:

Pursuant to my call yesterday, enclosed is my personal check for \$11.00 in payment for a copy of the above opinion (\$2.00) and certified copy (\$9.00).

Although your office told me to cite 81-1043, I note from the bound volumes of that appeal that 81-1043 and 81-1044 are both stated, so I included both for accuracy.

Please send me a certified copy of the opinion to my address below, which I need for further proceedings in the U.S. Patent and Trademark Office, which will require a certified order pursuant to 15 U.S.C. 1119 to correct its public record.

Sincerely,

A handwritten signature in cursive script, reading "Joan Crosby Tibbetts".

Joan Crosby Tibbetts
President, and
Administratrix, Percy Crosby Estate

Enc. (1) check No. 3634

EXHIBIT 116